# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1966**

## No. 343

**PRIMA PAINT CORPORATION, PETITIONER,**

*vs.*

**FLOOD & CONKLIN MFG. CO.**

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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[fol. 1]

# IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 30365

PRIMA PAINT CORPORATION, Plaintiff-Appellant,

against

FLOOD & CONKLIN MFG. CO., Defendant-Appellee.

---

MOTION TO DISMISS APPEAL—Filed March 15, 1966

Appellee, Flood & Conklin Mfg. Co., moves the Court to dismiss the appeal herein from the Order made by the Hon. Thomas F. Croake, District Judge for the United States District Court for the Southern District of New York and filed February 21, 1966, on the ground that said appeal is frivolous.

Appellee further moves this Court that it be awarded just damages for delay and its costs in accordance with 28 U.S.C. §1912.

Wachtel & Michaelson, By Martin A. Coleman, a Partner, Attorneys for Defendant-Appellee, 575 Madison Avenue, New York, New York 10022.

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NOTICE OF MOTION TO DISMISS APPEAL—
Filed March 15, 1966

To:

Robert P. Herzog, Esq.
Attorney for Plaintiff-Appellant
280 Madison Avenue
New York, New York 10016

Notice is hereby given that on March 21, 1966, at 10:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, the Defendant-Appellee in the

[fol. 2] above-entitled case will present to the United States Court of Appeals for the Second Circuit at the United States Courthouse, Foley Square, New York, New York, its motion to dismiss the appeal, and for such further relief as to the Court may seem fit and proper.

Annexed is a copy of said motion and of a Memorandum of Law in support thereof, which, together with this notice, are herewith served upon you.

Dated: New York, New York, March 14, 1966.

Wachtel & Michaelson, By Martin A. Coleman, A Partner, Attorneys for Defendant-Appellee, 575 Madison Avenue, New York, New York 10022.

---

[fol. 3]

[Title omitted]

AFFIDAVIT OF MARTIN A. COLEMAN IN SUPPORT OF MOTION TO DISMISS

State of New York,
County of New York, ss.:

Martin A. Coleman, being duly sworn, deposes and says:

1. I am a member of the firm of Wachtel & Michaelson, attorneys for Defendant-Appellee and am a member of the bar of this Court. This affidavit is respectfully submitted in support of Appellee's motion to dismiss the pending appeal as frivolous.

2. On March 3, 1966, Appellant filed a Notice of Appeal (Exhibit A annexed hereto) in which it states that it is appealing from the Order below (Exhibit B annexed hereto). Said Order, and the memorandum of Judge Croake upon which it is based (Exhibit C annexed hereto) denied plaintiff's motion to stay arbitration proceedings between the parties and granted defendant's motion to stay an action commenced by plaintiff seeking to rescind a contract between the parties on the ground of fraud in

the inducement. The Court below held that the arbitration clause contained in the agreement between the parties is sufficiently broad to cover a dispute over fraudulent inducement. It accordingly ordered the parties to proceed to arbitrate their disputes.

[fol. 4] 3. The motions of plaintiff and defendant had been argued before Judge Croake on November 23, 1965. From that date until the Order entered on February 21, 1966, defendant was precluded from proceeding with arbitration. After the Order was served, your deponent advised the American Arbitration Association of the outcome and was informed by their Tribunal Clerk that all necessary steps to expedite the arbitration proceeding would be commenced. Thereupon, however, Appellant filed its Notice of Appeal and obtained an *ex parte* stay from Judge Croake which temporarily restrains the parties from proceeding with arbitration during the pendency of the appeal.

4. There is annexed hereto the papers upon which the Court below rendered its decision that the action commenced by plaintiff should be stayed and that the disputes between the parties were to be resolved by arbitration. These papers are as follows:

I. Affidavit of Robert P. Herzog (plaintiff's attorney) sworn to November 12, 1965.

II. Affidavit of Martin A. Coleman (defendant's attorney) sworn to November 18, 1965, with the following exhibits annexed thereto:

1. Plaintiff's complaint.

2. The agreement between the parties which is an exhibit to the complaint.

3. Letter dated September 17, 1965, from plaintiff to my firm in which plaintiff raises various purported "breaches".

4. Defendant's Demand for Arbitration dated October 25, 1965.

[fol. 5] 5. Stipulation extending plaintiff's time to respond to said Demand until November 15, 1965.

6. Order of confirmation of plan of arrangement.

III. Affidavit of Robert Herzog sworn to November 22, 1965.

IV. Affidavit of Albert H. Shuger sworn to November 20, 1965.

5. It is obvious that plaintiff is seeking every possible means to delay the eventual arbitration of the dispute between the parties. Such delay, which is now of almost five months' duration, is highly detrimental to defendant since the moneys due to defendant from plaintiff, and upon which defendant relies, cannot be received until the matter is finally resolved. It is your deponent's further belief that there is absolutely no merit to the instant appeal and that it is merely another delaying tactic. This Court should accordingly dismiss the appeal as frivolous so that the parties may proceed to arbitrate their disputes. Further, because of the obvious delaying tactics by plaintiff, this Court should award defendant damages and double costs pursuant to 28 U.S.C. §1291. There is being submitted to this Court simultaneously herewith a Memorandum of Law in support of the contentions contained herein.

Wherefore your deponent prays for an Order dismissing [fol. 6] the instant appeal as frivolous and granting Defendant-Appellee damages and double costs.

Martin A. Coleman

Sworn to before me the 11th day of March, 1966.

Gloria J. Katzman, Notary Public, State of New York, No. (Illegible), Qualified in Kings County, Commission Expires March 30, 1967.

[fol. 7]

EXHIBIT A TO AFFIDAVIT OF MARTIN A. COLEMAN

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

65 Civil 3416

PRIMA PAINT CORPORATION,

Plaintiff-Appellant,

—against—

FLOOD & CONKLIN MFG. CO.,

Defendant-Respondent.

Filed
3-3-66

NOTICE OF APPEAL

SIRS:

PLEASE TAKE NOTICE, that the plaintiff-appellant in the above entitled matter, hereby appeals to the United States Court of Appeals for the Second Circuit, from the memorandum endorsement dated February 11, 1966, made by the Honorable Thomas F. Croake, U.S.D.J., and the order settled thereon dated February 21, 1966, on plaintiff-appellant's motion for a stay of arbitration and defendant-respondent's motion for a stay of proceedings pending arbitration, and each and every part thereof.

Dated: New York, N. Y.,
February 16, 1966

Yours, etc.,

ROBERT P. HERZOG
Attorney for Plaintiff-Appellant
280 Madison Avenue
New York, New York 10016

To:

Clerk of the United States District Court
Southern District of New York

Wachtel & Michaelson, Esqs.,
Attorneys for Defendant-Respondent
575 Madison Avenue
New York, New York 10022

---

[fol. 8]

Exhibit B to Affidavit of Martin A. Coleman

United States District Court

Southern District of New York

65 Civ 3416

---

Prima Paint Corporation,

Plaintiff,

—against—

Flood & Conklin Mfg. Co.,

Defendant.

---

Order

This cause having come on to be heard on the motion by plaintiff for an order, pursuant to Rule 65, Federal Rules of Civil Procedure, to stay arbitration, and on the motion by defendant, pursuant to Rule 7(b), Federal Rules of Civil Procedure and 9 U.S.C.A. §1 et seq., to stay this action pending arbitration, and the Court having heard the argument of counsel and being fully advised, it is

ORDERED that:

1. The motion by plaintiff to stay arbitration between the parties is denied.

2. The motion by defendant to stay this action until arbitration has been had in accordance with the terms of the Agreement between the parties dated October 7, 1964, is granted.

3. The parties are directed to proceed with arbitration in accordance with the terms of the Agreement between the parties dated October 7, 1964.

Dated: New York, New York
February 21st, 1966

/s/ THOMAS F. CROAKE
United States District Judge

U. S. District Court
Filed
Feb. 21, 1966
S. D. of N. Y.

[fol. 9]

EXHIBIT C TO AFFIDAVIT OF MARTIN A. COLEMAN

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

65—Civ. 3416

---

PRIMA PAINT CORPORATION,

Plaintiff,

—v.—

FLOOD & CONKLIN MFG. CO.,

Defendant.

---

CROAKE, District Judge

MEMORANDUM

These are motions: (a) by the plaintiff, pursuant to Rule 65, Fed. R. Civ. P., to stay arbitration, and (b) by the defendant, pursuant to Rule 7(b), Fed. R. Civ. P., and 9 U.S.C.A. § 1 et seq., to stay this action pending arbitration. Both motions will be decided in the instant opinion.

This action arises out of a Consulting Agreement entered into on October 7, 1964 whereby the defendant agreed to serve the plaintiff "in an advisory and consultative capacity," not to compete with Prima, and to turn over to the plaintiff certain customer lists. Prima agreed to make payments to Flood & Conklin, commencing September 1, 1965, based upon sales to former customers of the defendant. [fol. 10] Paragraph 8 of the Consulting Agreement states:

"8. *Arbitration.* Any controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be settled by arbitration in the City of New York, in accordance with the rules then obtaining of the American Arbitration Association, by three arbitra-

tors, one of whom shall be an attorney-at-law and one of whom shall be a certified public accountant, and judgment upon the award rendered may be entered in any Court having jurisdiction thereof. The costs of arbitration shall be shared equally by Prima and F&C."

On or about October 14, 1964, the defendant filed a voluntary petition under Chapter XI of the Bankruptcy Act. An Amended Plan of Arrangement was confirmed and the debtor was revested with its assets on March 16, 1965.

In a letter to the attorneys for the defendant dated September 17, 1965, the plaintiff alleged certain "breaches" of the agreement by F&C. On October 25, 1965 the defendant served a Notice of Intention to Arbitrate on the plaintiff; and, on November 12, 1965, three days before the expiration of the plaintiff's time to appear, answer or otherwise move with regard to the demand for arbitration, Prima instituted this action seeking to rescind the Consulting Agreement on the grounds of fraud in the inducement.

[fol. 11] In an affidavit dated November 20, 1965, one Albert A. Shuger, the President of the plaintiff, alleges that "the parties hereto had originally agreed to execute the agreement on October 21, 1964. However, upon the urging and pleas of Jerome K. Jellin, principal of the defendant corporation, because of the need of the proceeds of the sale for another business investment, the date was accelerated and the agreement executed earlier and on October 7, 1964 . . . . If the true facts had been known to the plaintiff, i.e., the defendant intended to file bankruptcy proceeding and immediately avail itself of the insolvency act, no agreement would have been entered into between the parties because such action would have and did damage, frustrate, impede and breach the agreement of the parties and was contrary to the very intention of the parties to the agreement . . . ." No fraud is specifically alleged with regard to the arbitration provision.

The court has read the extensive memoranda of law submitted and, after careful consideration, is of the opinion that this action should be stayed pending arbitration. [fol. 12] The plaintiff urges several lines of argument but they are of no avail. The arbitration clause herein is broad and is almost identical to the one recommended by the American Arbitration Association. See *In Re Kinoshita & Co.*, 287 F. 2d 951, 953 (2d Cir. 1961). In that case, it was stated in dictum that such a clause "would clearly have been sufficiently broad to cover a dispute over fraudulent inducement . . . ." 287 F. 2d at p. 953.

In the leading case of *Robert Lawrence Company* v. *Devonshire Fabrics, Inc.*, 271 F. 2d 402 (2d Cir. 1959), *cert. granted*, 362 U.S. 909 (1960), dismissed pursuant to Rule 60, 364 U. S. 801 (1960), the court held, in dealing with an arbitration clause similar to the one at bar, that: "We think that the charge of fraud in the inducement comes squarely within the phraseology of this particular agreement and that nothing short of a renascence of the old judicial hostility to arbitration could evolve a contrary ruling." 271 F. 2d at p. 412. See also p. 410 where Judge Medina, writing for the court, added that:

> "Finally, any doubts as to the construction of the Act ought to be resolved in line with its liberal policy of promoting arbitration both to accord with the original intention of the parties and to help ease the current congestion of court calendars. Such policy has [fol. 13] been consistently reiterated by the federal courts and we think it deserves to be heartily endorsed . . . . Once it is settled that arbitration agreements are 'valid, irrevocable, and enforceable' we know of no principle of law that stands as an obstacle to a determination by the parties to the effect that arbitration should not be denied or postponed upon the mere cry of fraud in the inducement, as this would permit the frustration of the very purposes sought to be achieved by the agreement to arbitrate, i.e., a

speedy and relatively inexpensive trial before commercial specialists."

Accordingly, the motion of the plaintiff to stay arbitration is denied and the motion of the defendant to stay this action pending arbitration is granted.

Settle order.

Dated: New York, N. Y.
February 10, 1966

/s/ THOMAS F. CROAKE
Thomas F. Croake
U. S. D. J.

U. S. District Court
Filed
Feb. 11, 1966
S. D. of N. Y.

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[fol. 14]

ATTACHMENT I TO AFFIDAVIT OF MARTIN A. COLEMAN

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

---

PRIMA PAINT CORPORATION,

Plaintiff,

—against—

FLOOD & CONKLIN MFG. CO.,

Defendant.

---

STATE OF NEW YORK )
COUNTY OF NEW YORK ) ss:

ROBERT P. HERZOG, being duly sworn, deposes and says:

That he is the attorney for the plaintiff herein, and as such, is fully familiar with all the facts and circumstances

herein, and makes this affidavit in support of plaintiff's application for a preliminary injunction and restraining order pursuant to Rule 65 of the Federal Rules of Procedure.

That contemporaneously with the application herein, plaintiff has instituted an action for rescision of contract by filing the summons and complaint with the Clerk of the United States District Court. A copy of the said complaint is annexed hereto and marked Exhibit A.

That annexed hereto and marked Exhibit B is a copy of a notice of intention to arbitrate pursuant to Section 7503 (c) of the New York State Civil Practice Law and Rules, which was served upon the plaintiff herein.

Annexed hereto as Exhibit C is a copy of a stipulation extending plaintiff's time to appear, answer or otherwise [fol. 15] move with regard to the said notice of intention to arbitrate heretofore served upon plaintiff by the attorneys representing the defendant.

That under the Civil Practice Law & Rules of the State of New York, the plaintiff is required to make a motion to a Court, to stay said arbitration, otherwise, the respondent would be precluded from asserting any defense as would constitute grounds for rescision of the contract.

The plaintiff will suffer immediate and irreparable injury unless the temporary restraining order is granted, prohibiting the defendant from proceeding with arbitration until the question of the validity of the contract, which is the subject matter of the District Court proceedings, can be litigated.

Deponent requests the Court to waive the giving of security by plaintiff herein for the reason that the defendant will not be pecunarily damaged if the temporary stay is granted inasmuch as it will only be prohibited from proceeding with a legal remedy which the plaintiff contends it is not entitled to because of the merits of the plaintiff's complaint. If the plaintiff prevails in the prosecution of its complaint herein, and the contract is rescinded, the defendant would not have been entitled to arbitration.

That no previous application for the relief herein sought has heretofore been made to this or any other Court.

WHEREFORE, deponent prays for the annexed order to show cause and temporary restraining order, restraining the defendant from proceeding with arbitration under an agreement dated October 7, 1964, until a hearing and [fol. 16] determination of the instant application, and for such other, further and different relief as to the Court may seem just.

.....

Sworn to before me this
12th day of November, 1965

---

[fol. 17]

ATTACHMENT II TO AFFIDAVIT OF MARTIN A. COLEMAN

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil Action File No. 65 Civ. 3416

---

PRIMA PAINT CORPORATION,

Plaintiff,

—against—

FLOOD & CONKLIN MFG. CO.,

Defendant.

---

Affidavit in Support of Defendant's Cross-Motion to Stay Action Pending Arbitration and in Opposition to Plaintiff's Motion to Stay Arbitration

STATE OF NEW YORK )
COUNTY OF NEW YORK ) ss.:

MARTIN A. COLEMAN, being duly sworn, deposes and says:

1. He is a member of the firm of Wachtel & Michaelson, attorneys for the defendant herein, and is fully familiar

with the facts and circumstances herein. This affidavit is submitted in support of defendant's cross-motion to stay this action, pursuant to Federal Arbitration Act, 9 U.S. C.A. §1 et seq., on the ground that the issue involved in this action is referable to arbitration under a written agreement, dated October 7, 1964, between the parties to this action. This affidavit is also submitted in opposition to plaintiff's motion herein, returnable pursuant to Order to Show Cause signed by the Honorable Justice Irving Ben Cooper, U.S. D.J. on November 15, 1965, on the 23rd day of November, 1965, requiring defendant to show cause why it should not be stayed, restrained and enjoined from proceeding with arbitration under said Agreement dated October 7, 1964.

2. Exhibit A to the Complaint in the above-captioned action is a Consulting Agreement dated October 7, 1964 between the parties to this action. Said Complaint, including [fol. 18] the Agreement, is annexed as Exhibit 1 hereto. By the terms of that Agreement, defendant (a) agreed to render advisory and consulting services (paragraph 2 of said Agreement), (b) agreed not to compete with plaintiff (paragraph 3 of said Agreement), and (c) turned over to plaintiff two lists of defendant's paint customers, consisting of an aggregate of more than 175 names of retail establishments in various states who were active customers purchasing paint for resale from defendant. These lists are referred to in paragraph 4(a) of the Agreement between the parties. In return, plaintiff agreed to make certain payments to defendant based upon sales to defendant's former customers on the lists. The first such payment was due September 1, 1965. (paragraph 4(c) of said Agreement).

3. Paragraph 8 of the aforesaid Consulting Agreement contains the agreement of the parties to arbitrate, as follows:

"8. *Arbitration.* Any controversy or claim arising out of or relating to this Agreement, or the breach thereof,

shall be settled by arbitration in the City of New York, in accordance with the rules then obtaining of the American Arbitration Association, by three arbitrators, one of whom shall be an attorney-at-law and one of whom shall be a certified public accountant, and judgment upon the award rendered may be entered in any Court having jurisdiction thereof. The costs of arbitration shall be shared equally by Prima [plaintiff] and F&C [defendant]."

4. As shown by the annexed letter, dated September 17, 1965 (Exhibit 2) from plaintiff to my firm as escrow agent, plaintiff has raised various purported "breaches" on the part of defendant relating to the Consulting Agreement. Pursuant to the agreement to arbitrate quoted above, defendant, on October 25, 1965, thereupon duly served upon plaintiff its Notice of Intention to Arbitrate (annexed hereto as Exhibit 3). Plaintiff's time to respond to said Notice was extended until November 15, 1965, by stipula- [fol. 19] tion (annexed as Exhibit 4 hereto). On November 12, 1965, a Friday, three days before its Answer to the Notice of Intention to Arbitrate was due to be served, plaintiff commenced this action in which, for the first time, it seeks to rescind—on the alleged grounds of fraud in the inducement—the Consulting Agreement. It also seeks by its motion to stay the pending arbitration despite the fact that no fraud relating to the rendition of consulting services, to the covenant not to compete, to the customer lists already turned over, or to the arbitration provision of the Agreement is even alleged by plaintiff. Indeed, since plaintiff has served no Memorandum of Law, its legal theory in support of its motion is not known.

5. Apparently, plaintiff is claiming that it was somehow fraudulently misled as to the solvency of defendant, because shortly after executing the Agreement, defendant filed a voluntary petition under the provisions of Chapter XI of the Bankruptcy Act. Plaintiff fails to point out, how-

ever, that defendant's Plan of Arrangement was accepted and that defendant was revested with its assets, as seen by the Order of Confirmation annexed hereto as Exhibit 5. Moreover, plaintiff has failed to point out how the foregoing could in any way have affected plaintiff to its detriment. At all events, it is crystal clear that there is no way in which the alleged fraud could have induced the arbitration provision agreed to by the parties.

6. In the Memorandum of Law submitted by defendant herewith, it is shown that the controlling decisions of the Court of Appeals for this Circuit require that, where an [fol. 20] arbitration provision as broad as that set forth in paragraph 3 of this affidavit is involved, a claim of fraud in the inducement must be submitted to arbitration, not to the court.

7. Moreover, under the applicable law discussed in the Memorandum of Law submitted herewith, mere allegations of fraud or false representation are not permitted to vitiate an agreement to arbitrate, since to hold otherwise would make it possible for any disgruntled contractor to avoid and delay his contractual obligations to arbitrate merely by glibly charging fraud or misrepresentation. Moreover, plaintiff has offered no affidavit of anyone present at either the negotiation or the execution of the Consulting Agreement with respect either to the claimed misrepresentation, or to the materiality of the claimed misrepresentation, or to the reliance by plaintiff thereon to its detriment.

8. In contrast, deponent, who participated in the negotiation and execution of the Consulting Agreement and who is thoroughly familiar with the correspondence between the parties subsequent and prior thereto, categorically asserts: (a) There was no misrepresentation; (b) defendant's financial condition at October 7, 1964 and the filing of its voluntary petition pursuant to Chapter XI of the Bankruptcy Act were not in any way material to the realization by plaintiff of the benefits contemplated by the Consulting Agreement; (c) plaintiff's reliance, as manifested

in the negotiations and in the Consulting Agreement, as well as in its conduct subsequent to October 14, 1964, was upon the customer lists of defendant which were delivered to plaintiff on October 7, 1964, on the agreement of defendant not to compete, and on the availability of Jerome [fol. 21] K. Jelin, an officer of defendant, to render consulting services, and no claim of fraud in respect to these matters is even alleged in the Complaint. Indeed, defendant was asked to, and did perform its consulting function without any claim of "fraud" having been raised by plaintiff until a year later; and (d) the arbitration provision in the Consulting Agreement was agreed to by both parties who where each represented by counsel. Indeed, counsel for plaintiff Prima commented on the arbitration clause during negotiations between the parties in August 1964, at which time counsel for both sides concurred in the desirability of having disputes resolved with the speed, and before the commercial specialists, available in arbitration proceedings.

By reason of the foregoing, it is respectfully urged the instant action should be stayed pending arbitration in accordance with the provisions of 9 U.S.C.A. §3 and costs of the motion should be allowed to defendant.

/s/ Martin A. Coleman
Martin A. Coleman

Sworn to before me this
18 day of November, 1965

Elsie Wilkes, Notary Public, State of New York, No. 30-4272700, Qualified in Queens County, Commission Expires March 30, 1967.

(Seal)

[fol. 22]

EXHIBIT 1 TO ATTACHMENT II

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Plaintiff demands trial by jury.

---

PRIMA PAINT CORPORATION,

Plaintiff,

—against—

FLOOD & CONKLIN MFG., CO.,

Defendant.

---

Plaintiff, complaining of the defendant, by its attorney, ROBERT P. HERZOG, respectfully shows and alleges:

FIRST: Jurisdiction is founded on a diversity of citizenship and amount. Plaintiff is a corporation incorporated under the laws of the State of Maryland, having its place of business in the State of Maryland, and the defendant is a corporation incorporated under the laws of the State of New Jersey, having its principal place of business in a state other than the State of Maryland. The matter in controversy exceeds, exclusive of interest and costs, the sum of $10,000.00.

SECOND: That on October 7, 1964, plaintiff, Prima Paint Corporation (hereinafter referred to as "Prima"), and defendant, Flood & Conklin Mfg., Co. (hereinafter referred to as "F & C"), executed an agreement in writing, which was contemporaneously supplemented and adjusted, wherein and whereby, *inter alia*, Prima employed F & C and F & C [fol. 23] agreed to work for Prima for a six year period. A copy of the said agreement, without its contemporaneous supplements and adjustments, is hereto annexed as Exhibit A and made a part hereof, as if fully set forth at length.

THIRD: That by the terms of the aforesaid agreement, F & C promised to serve Prima in an advisory and consultative capacity to the extent that Prima may reasonably require, in connection with the formulae, manufacturing operations, sales and servicing of Prima's trade sales accounts.

FOURTH: That in consideration of the foregoing promise of F & C, Prima agreed to pay to F & C a percentage of all its receipts from customers of F & C or customers who purchased F & C's products, as defined in the said agreement, for the next six years, the total aggregate to F & C, however, not to exceed $225,000.00.

FIFTH: Among the provisions of the said agreement, it was provided that any controversy or claim arising therefrom would be settled by arbitration in the City of New York.

SIXTH: That upon the urging of F & C, its agents, servants, employees or attorneys, Prima was fraudulently induced to accelerate the execution and closing date of the said agreement herein, from October 21, 1964 to October 7, 1964.

SEVENTH: That prior to the execution of the aforesaid agreement, F & C, its agents, servants, employees, or attorneys, represented and stated to Prima that F & C was [fol. 24] in all respects a solvent corporation and able to perform all of the terms and conditions of the said agreement on its part to be performed.

EIGHTH: That the said representations and statements made by F & C, its servants, agents, employees or attorneys, that it was in all respects a solvent corporation and able to perform all the terms and conditions of the agreement on its part to be performed, were false and fraudulent when made and that F & C, its agents, servants, employees, or attorneys, knew or had reasonable cause to know that the representations and statements were false and fraudulent when made.

NINTH: That in truth and in fact, F & C was an insolvent corporation, and its agents, servants, employees or attorneys knew or had reasonable cause to know same, and upon information and belief, had consulted attorneys with regard to or had participated and prepared applications for a proceeding pursuant to the insolvency provisions of Chapter XI of the Bankruptcy Act.

TENTH: That on or about October 14, 1964, F & C filed a voluntary petition under the provisions of Chapter XI, Section 322 of the Bankruptcy Act in the United States District Court for the District of New Jersey.

ELEVENTH: That Prima, not knowing the truth with regard to the said statements and representations, but believing them to be true, and in reliance thereon, was thereby induced to accelerate the closing date thereof and execute the agreement referred to herein as Exhibit A.

[fol. 25] TWELFTH: That Prima relied on the aforesaid false and fraudulent representations and statements that F & C was in all respects a solvent corporation and able to perform all the terms and conditions of the agreement on its part to be performed, and Prima would not have accelerated the date of the execution, nor would Prima have entered into the said agreement hereinabove set forth, but for the false and fraudulent representations and statements made by F & C.

THIRTEENTH: That plaintiff has no adequate remedy at law.

WHEREFORE, plaintiff demands judgment that the agreement herein dated October 7, 1964, be rescinded, declared null and void, that Prima and F & C be made whole, and that the plaintiff have such other, further and different relief as to the Court may seem just and proper, together with the costs and disbursements of this action.

ROBERT P. HERZOG
Attorney for Plaintiff
Office & P. O. Address
280 Madison Avenue
New York, New York, 10016

PLEASE TAKE NOTICE, that pursuant to the provisions of the Rules of Civil Procedure, Prima Paint Corporation, plaintiff herein, demanded a trial by jury of the issues raised herein.

---

[fol. 26]

EXHIBIT 2 TO ATTACHMENT II

## CONSULTING AGREEMENT

CONSULTING AGREEMENT dated October 7, 1964, between PRIMA PAINT CORPORATION, a Maryland corporation ("Prima"), and FLOOD & CONKLIN MFG. CO., a New Jersey corporation ("F&C").

---

Prima desires to secure the services of F&C on an advising and consulting basis, in connection with the take-over and operation of the Trade Sales business formerly conducted by F&C, and F&C is willing to perform such services.

NOW, THEREFORE, in consideration of the premises and of the mutual agreements hereinafter set forth, the parties hereto agree as follows:

1. *Employment and Term.* Prima hereby employs F&C and F&C agrees to work for Prima, on the terms and conditions hereinafter set forth, for a six year period (hereinafter called the "Consulting Period") commencing at the date hereof and ending at the close of business on October 7, 1970.

2. *Services.* During the Consulting Period, F&C shall serve Prima in an advisory and consultative capacity to the extent Prima may reasonably require, in connection with the formulae, manufacturing operations, sales and servicing of Prima Trade Sales accounts. It is agreed that such services shall be performed by Jerome K. Jelin, Chairman of F&C except in the event of his death or disability, and F&C

agrees to employ him for such purpose. Any out of pocket expenses incurred at Prima's request shall be reimbursed to F&C.

3. *Covenant Not to Compete.* F&C agrees that for a period of seventy-two (72) months from and after the date hereof it will not make any Trade Sales of paint or paint products (a) in the territory in which it was making such trade sales within the year prior to this date, or (b) to [fol. 27] any of the customers who purchased Trade Sales paint or paint products from F&C within the said one year period prior to this date.

4. In consideration of F&C's agreement not to compete in trade sales of paint and paint products and in consideration further of F&C's agreement to act as a consultant to Prima, Prima agrees to make payments to F&C in the amount and under the terms and conditions as follows (it being understood and agreed that wherever reference is made to "Prima" herein it shall include Prima as well as all of its subsidiaries and/or affiliates engaged in the paint business):

(a) Prima agrees to pay F&C an amount equal to Five (5%) percent of all of its receipts from customers of F&C listed in Exhibit "A" hereto, and Two (2%) percent of its receipts from those listed in Exhibit "B" hereto, in either case arising out of the sale of any and all paint and/or paint products by Prima to those so listed in Exhibits "A" and "B" during the term hereof, whether the paint and/or paint products so sold bears the labels, trade names heretofore used by F&C or any other labels, trade names or designation.

(b) Prima agrees during the term hereof to pay F&C an amount equal to Five (5%) percent of all of its receipts from its customers other than those covered by subdivision (a) who purchase F&C products (as hereinbelow defined), and except that where such customers are supermarkets other than those listed in Exhibit "B" hereto, Prima shall

only pay to F&C Two (2%) percent of its receipts from said supermarket customers. As used herein, F&C products shall mean any and all paint and/or paint products sold under the trade names, brand names, trade marks, formulae, patents and/or labels sold to Prima pursuant to Agreement with F&C dated August 21, 1964.

[fol. 28] (c) Starting the first day of the eleventh month after the closing date, namely, September 1, 1965, and on the first day of every month thereafter during the term hereof, Prima shall pay the sum of $2,500.00 per month to F&C as an advance against the percentage payments described in subparagraphs "(a)" and "(b)" of this Paragraph "4". If, however, the sales volume encompassed by subparagraphs "(a)" and "(b)" accounts shall fall below $600,000. in any full calendar year beginning with the year 1965, then Prima's obligation under this subparagraph "(c)" shall in the immediately succeeding year be reduced by $500. per month for each $100,000., or fraction thereof, of sales by which the aggregate sales falls below $600,000. If the sales in any later years increase and exceed $600,000. then the original amount to be paid monthly shall be resumed. By way of illustration: if such sales in the calendar years 1966, 1967 and 1968 should aggregate $450,000., $750,000. and $525,000., respectively, then the monthly advances to be paid in the years 1967, 1968 and 1969 shall be $1,500.00, $2,500.00, and $2,000.00 respectively.

(d) Beginning on the fifteenth day of February, 1965 and on the fifteenth day of every third month thereafter, Prima shall render to F&C a statement verified by Prima's chief financial officer, which statement shall (i) set forth the status of the account between the parties pursuant to "(a)" and "(b)" above, and (ii) itemize all sales made, and all payments received, by Prima, by customer name and amounts during the preceding three (3) months. The initial statement rendered hereunder shall cover the entire period from the closing date to the end of December, 1964.

(e) On March 1, 1965 and every March 1st thereafter, and then finally on the first day of the 74th month after the closing date, Prima shall render to F&C a statement certified by a certified public accountant setting forth the status of account between the parties covering the pre-
[fol. 29] ceding calendar year (the statement rendered on the 74th month shall cover only the period beginning with the last preceding January 1st until the end of the term hereof). At the time each statement required to be made under this subparagraph "(e)" is rendered, there shall be a cash settlement of the account between the parties.

(f) For the purposes of computing the amounts required to be paid under subparagraphs "(a)" and "(b)" hereunder, the amount of Prima's receipts shall be deemed to be the amount actually received plus any amounts by which the basic sales price has been reduced because of credits, allowances or waivers which relate directly or indirectly to allowances for advertising.

(g) The payments by Prima under "(a)" and "(b)" hereof shall cease when the aggregate amount paid to F&C equals $225,000. or upon the expiration of the term hereof, whichever is the first to occur.

(h) Notwithstanding the expiration of the term hereof, Prima shall continue to make payments to F&C based on the percentages set forth in subparagraphs "(a)" and "(b)" for all payments received by Prima after the expiration date arising out of sales encompassed by said subparagraphs which were shipped before the expiration date. On the tenth of the second month following the expiration date, and on the tenth of each month thereafter, Prima shall account and make payments to F&C under this subparagraph "(h)" covering all applicable receipts of the preceding months or month, as the case may be.

(i) Prima shall maintain for a period of seven (7) years from the date hereof all necessary books and records to sub-
[fol. 30] stantiate the sales and receipts reports provided

for herein. F&C shall have the right and authority to audit or otherwise verify Prima's sales and receipts and to that end shall have access to all relevant records of Prima.

5. *Notices.* Any notice to be given to F&C hereunder shall be sent by registered or certified mail addressed to it at 136 Chestnut Street, Newark 5, New Jersey, and c/o Wachtel & Michaelson, 575 Madison Avenue, New York, New York 10022, and any notice to be given to Prima hereunder shall be sent by registered or certified mail addressed to it at 819 South Caroline Street, Baltimore, Maryland, and c/o Charles M. Cahn, Jr., 912 Fidelity Building, Baltimore, Maryland.

6. *Miscellaneous.* (a) This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns.

(b) This Agreement embodies the entire understanding of the parties on the subject matter and no amendment or modification of it shall be valid or binding upon the parties unless in writing.

7. Notwithstanding anything to the contrary contained herein, if at any time prior to the full completion of the payments due F&C from Prima, as set forth in paragraph "4" hereof, (i) there shall be filed against Prima in any court, pursuant to any Federal or state statute, a petition in bankruptcy or insolvency or for reorganization or for the appointment of a receiver or trustee of all or substantially all of Prima's property, and such petition shall not be stayed, dismissed or vacated within forty-five (45) days after the filing thereof, or (ii) Prima shall itself file as aforesaid a petition in bankruptcy or insolvency or for reorganization [fol. 31] under any Federal or state statute in aid of debtor or for the appointment of a receiver or trustee of all or a substantial part of its property, or (iii) Prima shall make an assignment for the benefit of creditors, or (iv) the estate or interest of Prima in the trade names and labels and/or the customer accounts and/or the good will represented

thereby, shall be levied upon or attached in any proceeding and such process is not vacated or discharged or adequately bonded by Prima within twenty (20) days after such levy or attachment, or (v) Prima fails to make any payments due to F&C as provided for in Paragraph "4" and within thirty (30) days after notice that such payments are delinquent, fails to make such payment or fails to adequately bond such amount or pay such amount in escrow to Messrs. Harry H. Wachtel and Charles M. Cahn, Jr., jointly, then and in any of such events there shall immediately become due to F&C from Prima the sum of $225,000., less any payments made pursuant to Paragraph "4", and in addition, all rights, estate or interest of Prima in and to the customer accounts set forth in Exhibits "A" and "B" annexed hereto, the trade names and labels and formulae comprising the F&C products shall automatically revert at once to F&C and shall once again become the absolute property of F&C without liability of any kind whosoever on F&C's part to return or repay any portion of the payments received by F&C from Prima hereunder. In any such event, no person, firm, corporation or other entity, except F&C shall have or obtain the aforesaid rights, estate or interest in and to said customer accounts, trade names and labels, and formulae or in and to the right to use said names or labels for the purpose set forth above.

8. *Arbitration.* Any controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be settled by arbitration in the City of New York, in accordance with the rules then obtaining of the American Arbitration Association, by three arbitrators, one of whom shall be an attorney-at-law and one of whom shall be a certified public accountant, and judgment upon the award rendered may be entered in any Court having jurisdiction thereof. The costs of arbitration shall be shared equally by Prima and F&C.

[fol. 32] 9. *Miscellaneous.* (a) Prima agrees that it will not sell, transfer or dispose of any of the customer accounts

set forth in Exhibits "A" and "B" annexed hereto, or the trade names and labels and formulae comprising the F&C products to any person, firm, or company unless such person, firm or company expressly undertakes to assume the obligation of Prima hereunder. In the event of any violation of this Agreement, then the provision of paragraph 7 shall apply.

(b) The individuals, partnerships or corporations listed in Exhibits "A" and "B", shall for all purposes hereof be deemed to include any successor entity thereto whether the same arises from merger, consolidation, combination or otherwise.

(c) This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns.

(d) This Agreement embodies the entire understanding of the parties on the subject matter and no amendment or modification of it shall be valid or binding upon the parties unless in writing.

IN WITNESS WHEREOF, the parties hereto have caused this Purchase Agreement to be duly executed on the day and year first above written.

FLOOD & CONKLIN MFG. CO.

By: /s/ JEROME K. JELIN
Jerome K. Jelin, Chairman

ATTEST:

/s/ ARTHUR M. GOLDEN
Arthur M. Golden, President

PRIMA PAINT CORPORATION

By: /s/ ALBERT A. SHUGER
Albert A. Shuger

ATTEST:

/s/ CHARLES M. CAHN, JR.
Charles M. Cahn, Jr.

[fol. 33]

EXHIBIT 3 TO ATTACHMENT II

PRIMA PAINT CORPORATION
819 South Caroline Street
Baltimore, Maryland 21231

Executive Offices

September 17, 1965
Certified Mail

Wachtel & Michaelson
575 Madison Avenue
New York, New York

Gentlemen:

Enclosed is a check drawn on the account of Prima Paint Corporation in the amount of $2,500.00 payable to Harry H. Wachtel and Charles M. Cahn, Jr., jointly, escrow agents. Said check represents payment made as of September 1, 1965 under the provisions of Paragraph 4 (c) of Consulting Agreement dated October 7, 1964 between Prima Paint Corporation and Flood & Conklin Mfg. Co. The enclosed payment is made to said escrow agents because Flood & Conklin Mfg. Co. is presently indebted to Prima Paint Corporation for failure to comply with various provisions of the above described Consulting Agreement and for failure to comply with various provisions of Purchase Agreement dated August 21, 1964 between Flood & Conklin Mfg. Co. and Prima Paint Corporation, both as supplemented by Supplementary Agreement dated October 7, 1964 between Flood & Conklin Mfg. Co. and Prima Paint Corporation.

In due course the details of the violations of the above described agreements by Flood & Conklin Mfg. Co. will be specified and the amount of the claim of Prima Paint Corporation will be stated in a liquidated amount insofar as this can be done. Pending the furnishing of particulars

by Prima Paint Corporation the escrow agents are requested to continue to hold the proceeds of the above check in escrow.

Among the breaches of the above agreement by Flood & Conklin Mfg. Co. are the following:

(a) In order to induce Prima Paint Corporation to enter into the above agreements, Flood & Conklin Mfg. Co., it's agents, servants or employees represented to Prima Paint Corporation that Flood & Conklin Mfg. Co. was in all respects a solvent corporation and able to perform on the terms and conditions of the agreement, whereas, the truth and in fact Flood & Conklin Mfg. Co. was insolvent and intended to file Proceedings for Arrangement under the Bankruptcy Act shortly after making the agreement.

[fol. 34] (b) Flood & Conklin Mfg. Co. has failed to comply with the provisions of paragraph 4 of the Supplementary Agreement, in that it has failed to make the payments required of it whether to Prima or to the respective customers.

(c) Flood & Conklin Mfg. Co. has failed to consult with Prima Paint Corporation in accordance with the provisions and spirit of the above described Consulting Agreement, resulting in substantial losses to Prima.

(d) Flood & Conklin Mfg. Co. has interfered with Prima and with the customers of Prima who were acquired from Flood & Conklin Mfg. Co. by advising such customers that Prima was obligated to accept returns of merchandise sold by Flood & Conklin Mfg. Co. to such customers under circumstances where Prima had not agreed with Flood & Conklin Mfg. Co. to accept such returns.

(e) Certain Pebble Mills which were purchased by Prima from Flood & Conklin Mfg. Co. were permitted by Flood & Conklin Mfg. Co. to be taken by the Receiver into the possession of the Receiver and Prima incurred substantial expenses and counsel fees in recovering it's property, to wit the Pebble Mills, from the Receiver.

(f) Inventory bearing labels and names which had been sold exclusively by Flood & Conklin Mfg. Co. to Prima were sold at public auction by the Receiver in violation of Prima's exclusive ownership of such labels and names.

(g) Flood & Conklin Mfg. Co. failed to disclose to Prima certain exclusive Territorial Agreements in violation of the representations and warranties of Flood & Conklin Mfg. Co. contained in the Purchase Agreement.

(h) Efforts of the Receiver to collect accounts receivable of Flood & Conklin Mfg. Co. and the failure of Flood & Conklin Mfg. Co. to supply to Prima current information with respect to the status of the accounts receivable of Flood & Conklin Mfg. Co. made it impossible for Prima to collect such accounts receivable for Flood & Conklin Mfg. Co. in accordance with the provisions of the Purchase Agreement and seriously interfered with the relationship between Prima and the debtors thereby reducing the value of such debtors as potential customers of Prima.

[fol. 35] (i) Flood & Conklin Mfg. Co. promised to share the cost of dismantling the "Purchased Machinery and Equipment" and the loading of same on trucks, which contribution was later refused.

(j) Pursuant to the above agreements Prima Paint Corporation was to have the use of the premises of the Flood & Conklin Mfg. Co. up to January 15, 1965, which was denied by Flood & Conklin Mfg. Co.

Yours very truly,

PRIMA PAINT CORPORATION

/s/ [illegible]

Treasurer

AV/rs

cc: Mr. Jerome Jelin
Mr. Robert Solomon
Mr. Charles Cahn

[fol. 36]

EXHIBIT 4 TO ATTACHMENT II

DEMAND FOR ARBITRATION

October 25, 1965

Prima Paint Corporation
819 So. Caroline Street
Baltimore, Maryland

Prima Paint Corporation
c/o Charles M. Cahn, Jr.
912 Fidelity Building
Baltimore, Maryland

PLEASE TAKE NOTICE, under Section 7503, Subdivision (c) of the Civil Practice Law and Rules of the State of New York, that the undersigned, pursuant to the provisions of a contract dated October 7, 1964, which agreement provides as follows:

> "8. *Arbitration.* Any controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be settled by arbitration in the City of New York, in accordance with the rules then obtaining of the American Arbitration Association, by three arbitrators, one of whom shall be an attorney-at-law and one of whom shall be a certified public accountant, and judgment upon the award rendered may be entered in any Court having jurisdiction thereof. The costs of arbitration shall be shared equally by Prima & F&C."

hereby demands arbitration thereunder.

NATURE OF DISPUTE: Failure by Prima Paint Corporation to make payments to Flood & Conklin Mfg. Co. in the sum of $2,500 on the first day of each month, commencing September 1, 1965, pursu-

ant to the terms of a written contract between the parties dated October 7, 1964.

CLAIM OR RELIEF SOUGHT: An award that Prima Paint Corporation is liable to Flood & Conklin Mfg. Co. for payments of $2,500 per month commencing as of September 1, 1965, and continuing thereafter as set forth in the aforesaid contract between the parties dated October 7, 1964.

[fol. 37] PLEASE TAKE FURTHER NOTICE, that unless within ten days after service of this Notice of Intention to Arbitrate, you apply to stay the arbitration herein, you shall thereafter be precluded from objecting that a valid agreement was not made or has not been complied with and from asserting in court the bar of a limitation of time.

HEARING LOCALE REQUESTED: New York City (Pursuant to the terms of the Agreement).

You are hereby notified that copies of our Arbitration Agreement and of this Demand are being filed with the American Arbitration Association in its New York Regional Office, with the request that it commence the administration of the arbitration.

Yours, etc.

WACHTEL & MICHAELSON
Attorneys for Flood & Conklin Mfg. Co.
Office & P.O. Address
575 Madison Avenue
New York, NY 10022

[fol. 38]

EXHIBIT 5 TO ATTACHMENT II

In the Matter of the Arbitration of Certain Differences Between

FLOOD & CONKLIN MFG. CO.,

Petitioner,

—and—

PRIMA PAINT CORPORATION,

Respondent.

IT IS HEREBY STIPULATED AND AGREED, by and between Wachtel & Michaelson, attorneys for Flood & Conklin Mfg. Co., and Robert P. Herzog, attorney for Prima Paint Corporation, that the respondent's time to appear, answer or otherwise move with regard to the petitioner's demand for arbitration dated October 25, 1965, be and the same hereby is extended to and including November 15, 1965.

Dated: New York, N. Y.
November 2, 1965

/s/ WACHTEL & MICHAELSON
Attorneys for Petitioner

/s/ ROBERT P. HERZOG
Attorney for Respondent

[fol. 39]

EXHIBIT 6 TO ATTACHMENT II

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

In Proceedings for an Arrangement Under Chapter XI of the Bankruptcy Act

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In the Matter of:

FLOOD & CONKLIN MFG. CO., a New Jersey Corporation,

Debtor.

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ORDER OF CONFIRMATION

This matter being opened to the Court by Ravin and Ravin, attorneys for the Debtor, and it appearing to the Court that a Petition has been filed by the above named Debtor proposing an arrangement under Chapter XI of the Act of Congress relating to Bankruptcy, and it appearing that the said Amended Plan of Arrangement has been duly accepted in accordance with the provisions of said Chapter and by said arrangement, and the sum of $70,225.14 having been deposited with the Receiver for the Debtor; and it further appearing that the provisions of said Chapter have been complied with, that the said Amended Plan of Arrangement is for the best interest of the creditors of the said Debtor and that the arrangement is feasible, that the Debtor has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to the discharge of a bankrupt, that the proposal and acceptance are in good faith and have not been made or procured by any means, promises or acts forbidden by said Act, it is on this 16th day of March, 1965,

ORDERED, that the said Amended Plan of Arrangement be and it is hereby confirmed, and the Debtor is hereby revested with its assets, and it is further

[fol. 40] ORDERED, that the Amended Plan of Arrangement and its provisions shall be binding upon the Debtor, upon any person issuing securities or acquiring the property under the Amended Plan of Arrangement, and upon all creditors of the Debtor; whether or not they are affected by the Amended Plan of Arrangement or have accepted it or have filed their claims, and whether or not their claims have been scheduled or allowed and are allowable, and it is further

ORDERED, that this Court shall retain jurisdiction for the limited purpose of requiring the Debtor to post any additional deposits which may be required under its Plan of Arrangement with respect to any additional claims which may be filed within the statutory six month period and to make any orders relative thereto and for the enforcement thereof; and it is further

ORDERED, that the Debtor has leave of this Court, within 30 days from the last day to file claims herein, to move to reduce, expunge or challenge any claims scheduled by the Debtor or filed herein by the creditors of the Debtor.

(Signature Illegible)
Referee in Bankruptcy

A True Copy
(Signature Illegible)
Referee in Bankruptcy

[fol. 41]

ATTACHMENT III TO AFFIDAVIT OF MARTIN A. COLEMAN

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

No. 65 Civil 3416

PRIMA PAINT CORPORATION,

Plaintiff,

—against—

FLOOD & CONKLIN MFG. CO.,

Defendant.

STATE OF NEW YORK )
COUNTY OF NEW YORK ) ss:

ROBERT P. HERZOG, being duly sworn, deposes and says:

That I am the attorney for the plaintiff, Prima Paint Corporation, and submit this affidavit, together with the annexed affidavit of Albert A. Shuger, president of Prima Paint Corporation, duly sworn to November 20, 1965, in support of plaintiff's application to stay arbitration pending a determination of the federal action for rescision heretofore instituted in this Court, and in opposition to the defendant, Flood & Conklin Mfg. Co.'s, cross-motion to stay the federal action pending arbitration.

The affidavit of Albert A. Shuger, unequivocally asserts the specific facts showing the fraudulent and false representation made to Prima and the effect and results arising therefrom.

It is clear from a reading of the agreement, Exhibit A annexed to the moving papers, that the parties intended [fol. 42] a viable corporation which would render the services agreed by the parties and insure smooth transition of the business, together with the goodwill that was inherent

therein. The default clause of the agreement (Par. 7th), revested certain property in F & C, *including the goodwill.* It is evident that the parties contemplated this goodwill and that it was a material part of the agreement.

The affidavit of Coleman alleges that there was "no fraud relating to the rendition of consulting agreement, to the covenant not to compete, to the customer lists," etc. (page 3). He appears to believe that the remedy of rescision of contract is separable to an agreement. Deponent submits that it is a hornbook principle of law that an instrument cannot be rescinded in part, *but must be rescinded in its entirety or not at all.* (*Friedman* v. *Richman,* 213 A.D. 467, 210 N.Y.S. 648; aff'd 241 N.Y. 576, 150 N.E. 561).

With regard to the materiality of the fraud, deponent believes it warrants little discussion because the materiality thereof is self-evident from a reading of the agreement.

Deponent submits, that the fact that the defendant successfully confirmed an arrangement in bankruptcy with its creditors does not expunge or vitiate the resultant losses, including the goodwill therefrom, the hiatus resulting therefrom and the deliberate misrepresentation that the defendant knew or had reasonable cause to believe that it would [fol. 43] not, and could not perform its part of the bargain set forth in the agreement. The defendant did not have any guarantees that it would be successful in effecting an arrangement with its creditors and could have quite easily been adjudicated and liquidated as a bankrupt.

The Coleman affidavit makes hay of the fact that the moving papers originally contained no affidavit of anyone present at either the negotiation or the execution of the agreement at issue herein.

It is obvious that this omission was merely temporary, and due to the fact that the plaintiff and its officers who have personal knowledge of the transactions, are non-resident of this State and the relief requested by the movant necessarily required short notice. The affidavit of Albert A. Shuger, president of the plaintiff, annexed hereto, more

than adequately cures this dilatory allegation which merely seeks to avoid the issues raised herein.

It is clear that an issue of fact is presented by the moving and answering papers which must be determined by the Court.

Deponent submits that the services and substance of this agreement, which was for a personal employment is not a contract evidencing a transaction in interstate commerce, regardless of the fact that the ultimate result of the production to which the advice and consultation related may or may not be commodities in interstate commerce; and regardless of the fact that interstate travel was an incident [fol. 44] to the advice and consultation bargained for, all of which is fully discussed in the memorandum of law submitted herewith.

It is therefore clear that these issues must be determined preliminarily by the Court herein.

Wherefore, deponent respectfully prays that the motion to stay arbitration be in all respects granted, and that the cross-motion be in all respects denied, and that the plaintiff have such other, further and different relief as may be just and proper in the premises.

/s/ Robert P. Herzog

Sworn to before me this
22nd day of November, 1965

[Stamp—Carolyn Andrews, Commissioner of Deeds, City of New York 1-74, Certificate Filed in New York County, Commission expires Sept. 24, 1966]

[fol. 45]

ATTACHMENT IV TO AFFIDAVIT OF MARTIN A. COLEMAN

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

No. 65 Civil 3416

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PRIMA PAINT CORPORATION,

Plaintiff,

—against—

FLOOD & CONKLIN MFG., CO.,

Defendant.

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STATE OF MARYLAND )
COUNTY OF BALTIMORE ) SS.:

ALBERT A. SHUGER, being duly sworn, deposes and says:

That I am President of Prima Paint Corporation, the Plaintiff in the above action and was present during all of the negotiations, closing and execution of the agreement which is the subject matter of the litigation herein, and as such am fully familiar with all of the facts and circumstances thereof.

That the parties hereto had originally agreed to execute the agreement on October 21, 1964. However, upon the urging and pleas of Jerome K. Jellin, principal of the defendant corporation, because of the need of the proceeds of the sale for another business investment, the date was accellarated and the agreement executed earlier and on October 7, 1964.

The fact, which is alleged without contradiction in the pleadings and adopted by reference in the moving papers which initiated this motion, in uncontroverted by the cross-movant in his opposing affidavit.

Defendant's Exhibit 2 annexed to the opposition papers and cross-motion, clearly demonstrates the fact that the

claim of misrepresentation was raised and alleged in writing as early as September 17, 1965 and prior to any demon-
[fol. 46] strated intention on the part of the defendant to arbitrate and prior to the institution of any suit.

Deponent, who was present and participated in all negotiations and execution of the agreement in question unequivocably asserts that the defendant, Flood & Conklin Mfg. Co., represented to the plaintiff that it was in all respects a solvent corporation and able to perform the terms and conditions of the agreement on its part to be performed. If the true facts had been known to the plaintiff, i.e. the defendant intended to file bankruptcy proceeding and immediately avail itself of the insolvency act, no agreement would have been entered into between the parties because such action would have and did damage, frustrate, impede and breach the agreement of the parties and was contrary to the very intention of the parties to the agreement. The agreement contemplates a viable corporation with the good-will inherent therein, which would render the agreed employment service as set forth in the agreement.

During the time of the negotiations, and even upon the threshold of the execution of the agreement, the defendant knew or had reasonable cause to know that it was insolvent and, in fact, was preparing to immediately file a petition in bankruptcy, which it subsequently did a mere seven days later, all to the plaintiff's detriment and destruction of its own good-will and ability to fulfill its covenants.

As a result of the subsequent insolvency proceedings voluntarily initiated by the defendant, plaintiff was deprived of the advisory and consultative services that it reasonably required, in particular the manufacturing operations, sales and servicing of the customer accounts and the benefit of the defendant's good-will heretofore enjoyed with said customers.

[fol. 47] The agreement entered into between the parties on October 7, 1964, contemplated and intended an orderly transfer of the assets of the defendant to the plaintiff, and

further contemplated and intended that the defendant would consult, advise, assist and help the plaintiff so as to insure a smooth transition of manufacturing operations to Maryland from New Jersey, together with the sales and servicing of customer accounts and the retention of the said customers.

As a result of the voluntary filing of the bankruptcy proceedings, there was no orderly transfer as was agreed and intended by the parties, but rather chaos and havoc because of the interposition of a Receiver in Bankruptcy, a subsequent hiatus in the sales and servicing of the said accounts, resultant loss of good-will in connection therewith, and an inability on the part of the defendant to perform the terms and conditions of the agreement on its part to be performed, all of which was foreseeable by the defendant as a direct result of its misrepresentation.

That the applicable law with regard to the issues raised by the parties hereto is set forth in a memorandum of law which will be submitted upon the argument of this motion.

Wherefore, deponent respectfully prays that Flood & Conklin Mfg. Co., be stayed, restrained and enjoined from proceeding to arbitrate any claims or controversies arising out of the agreement dated October 7, 1964, between the parties to this action, until the validity of the said agreement has been determined by this Court, and that plaintiff have such other, further and different relief as may be just and proper.

/s/ ALBERT A. SHUGER
Albert A. Shuger

Sworn to before me this
20th day of November, 1965

/s/ A. ELY FEHESE
My commission expires 7/1/67

[fol. 48] [File endorsement omitted]

[fol. 49]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

---

PRIMA PAINT CORPORATION, Plaintiff-Appellant,

—against—

FLOOD & CONKLIN MFG. Co., Defendant-Appellee.

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AFFIDAVIT OF ROBERT P. HERZOG IN OPPOSITION TO MOTION TO DISMISS—Filed March 18, 1966

State of New York,
County of New York, ss.:

Robert P. Herzog, being duly sworn, deposes and says:

That I am the attorney of record for the plaintiff-appellant herein, and as such, am fully familiar with all the facts and circumstances hereinafter set forth.

This affidavit is submitted in opposition to appellee's motion to dismiss the pending appeal as frivolous.

As set forth in the moving affidavit of Martin A. Coleman, paragraph 3 thereof, the motions of the plaintiff and defendant had been argued before Judge Croake on November 23, 1965, and subsequent thereto, both plaintiff and defendant were awaiting a decision thereon.

Thereafter, and on February 21, 1966, pursuant to the decision of Judge Croake, an order was entered, directing [fol. 50] the parties to proceed with arbitration. A copy of the said decision and order is annexed to the moving papers and marked Exhibits C and B respectively.

Appellant promptly thereafter filed its Notice of Appeal and obtained a stay from Judge Croake of his order dated February 21, 1966.

It is clear that appellant moved promptly upon the rendering of the decision and the entry of the order, and any delay in this matter was not of appellant's making.

In addition to the foregoing, it is not appellant's intention, nor have appellant's actions been such as to indicate an attempt to frustrate or impair the appellee's possible rights in this matter.

In matter of fact, appellant has been and is continuing to make payments under protest, to an escrow fund held jointly by Harry H. Wachtel and Charles M. Cahn, Jr., Mr. Wachtel being a member of the firm of Wachtel & Michaelson, attorneys for the defendant-appellee, (Exhibit 2, sub. (3) of the moving papers), thereby assuring the appellee that any delay would not materially affect their recovery, if any, in the proceeding.

As indicated in appellant's brief, submitted simultaneously herewith, there are several good and meritorious reasons for the appeal entered herein, and, as the various citations indicate, it has been the attitude of the Courts [fol. 51] that the right to a trial in a Court of law is a most serious and valuable right as against an informal proceeding in arbitration. Plaintiff-appellant seeks the protection of proceedings in courts of law with respect to a most serious question of fraud in the inducement, and, as clearly indicated in plaintiff-appellant's brief, there is much law to support plaintiff-appellant's rights herein.

In matter of fact, it is appellant's contention that the instant motion is an attempt by appellee to deprive appellant of its rights herein by forcing and pressuring the appellant to prepare and submit briefs on this question within a far shorter period than would have been permitted under the normal rules covering appeals in this Court.

The notice of motion herein was served on appellant on March 14, 1966 at 12:10 in the afternoon, plaintiff-appellant's briefs to be served and filed by 2:00 P. M. on March 18, 1966.

Accordingly, your affiant has, on behalf of plaintiff-appellant, prepared a short brief which merely highlights clearly and convincingly that there is a good and meritorious appeal herein, and that serious questions with respect to error on the part of the Court below exist.

It is clear that no question as to frivolity exists. This is not plaintiff-appellant's purpose as is evident from the

good faith in making the necessary payments under the escrow.

[fol. 52] Wherefore, your affiant prays that defendant-appellee's instant motion be dismissed and granting plaintiff-appellant costs and disbursements.

Robert P. Herzog

Sworn to before me this 17th day of March, 1966.

Carolyn Andrews

[Stamp—Carolyn Andrews, Commissioner of Deeds, City of New York 1-74, Certificate Filed in New York County, Commission expires Sept. 24, 1966]

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[fol. 53] [File endorsement omitted]

[fol. 54]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Present: Hon. Sterry R. Waterman, Hon. Leonard P. Moore, Hon. Wilfred Feinberg, Circuit Judges.

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PRIMA PAINT CORPORATION, Plaintiff-Appellant,

v.

FLOOD & CONKLIN MFG. Co., Defendant-Appellee.

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ORDER DISMISSING APPEAL—May 12, 1966

A motion having been made herein by counsel for the appellee to dismiss the appeal for frivolousness and for other and further relief,

Upon consideration thereof, it is

Ordered that said motion be and it hereby is granted and that the appeal from the United States District Court for the Southern District of New York be and it hereby is dismissed with costs to the appellee.

[fol. 55] [File endorsement omitted]

[fol. 56]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

September Term, 1965.

(Submitted March 30, 1966 Decided May 12, 1966.)

Docket No. 30365

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PRIMA PAINT CORPORATION, Plaintiff-Appellant,

—v.—

FLOOD & CONKLIN MFG. Co., Defendant-Appellee.

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Before: Waterman, Moore and Feinberg, Circuit Judges.

OPINION—May 12, 1966

Appellee having served notice on appellant to proceed to arbitration, appellant commenced action in the United States District Court for the Southern District of New York to rescind the contract between the parties of which the agreement to arbitrate was one of several clauses. The parties then cross-moved, appellant to stay arbitration and appellee to have arbitration ordered. The court below, Croake, *J.*, granted appellee's motion and ordered the parties to proceed to arbitration, which order appellant sought to have reversed upon appeal. Appellee, claiming that the appeal was frivolous, moved to dismiss it. Motion to dismiss granted.

[fol. 57] Robert P. Herzog, New York City, for Plaintiff-Appellant.

Wachtel & Michaelson (David N. Brainin, Martin A. Coleman, of counsel), for Defendant-Appellee.

WATERMAN, Circuit Judge:

The district court ordered appellant and appellee to proceed with arbitration of their disputes and differences in

accord with an agreement they had entered into providing for settlement by arbitration of "Any controversy or claim arising out of or relating to this Agreement, or the breach thereof."

Appellant timely filed a notice of appeal and appellee has moved to dismiss the appeal as frivolous. After a full examination of the moving papers, briefs and affidavits of the parties, and the memorandum opinion below, we grant the appellee's motion and dismiss the appeal.[1]

We but sketchily summarize the situation out of which the arbitrable disputes arose lest by too detailed a statement we appear to be suggesting to the arbitrators the result they should reach.

On October 7, 1964, plaintiff-appellant, a Maryland corporation, and defendant-appellee, movant, a New Jersey corporation, entered into a contract which contained the following clause:

> 8. *Arbitration.* Any controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be settled by arbitration in the City of New York, in accordance with the rules then obtaining [fol. 58] of the American Arbitration Association, by three arbitrators, one of whom shall be an attorney-at-law and one of whom shall be a certified public accountant, and judgment upon the award rendered may be entered in any Court having jurisdiction thereof. The costs of arbitration shal be shared equally by Prima & F&C.

On September 17, 1965, plaintiff notified defendant that plaintiff claimed defendant had breached the contract (and listed among the claimed breaches ten specific ones), and therefore plaintiff was going to pay to an escrow agent monthly payments it had agreed to pay defendant under the contract. On October 25, 1965, defendant notified plain-

[1] See *Chatham Shipping Co.* v. *Fertex S.S. Corp.*, 352 F. 2d 291, 294-95 (2 Cir. 1965).

tiff that it was demanding arbitration of plaintiff's failure to pay to it these agreed monthly payments. This notification was made pursuant to Section 7503(c) of the New York Civil Practice Law and Rules, and defendant filed a copy of its demand with the American Arbitration Association, with a request that the Association commence the pre-arbitration details. On November 12, 1965, defendant having agreed to grant plaintiff an extension of time until November 15 within which to answer the arbitration demand, plaintiff commenced its action against defendant in the United States District Court for the Southern District of New York to obtain a rescission of the October 7, 1964 contract on the ground of alleged frauds by defendant at the time plaintiff was induced to enter into the contract. Plaintiff did not allege that it was fraudulently induced to enter into the arbitration clause.

Thereupon defendant moved pursuant to Rule 7(b), Fed. R. Civ. P. to stay plaintiff's action pending arbitration, and plaintiff cross-moved pursuant to Rule 65, Fed. R. Civ. P. to stay an arbitration pending adjudication upon the merits of plaintiff's action. Disposing of both motions simultane- [fol. 59] ously the district court denied plaintiff's motion, granted the stay defendant requested, and, as stated above, directed that an arbitration proceed.

Plaintiff's action is a diversity action, but if the contract sought to be rescinded evidences a transaction involving interstate commerce (excluding employment contracts of interstate workers) the arbitration clause in the contract is valid, irrevocable and enforceable unless grounds exist to revoke the contract, 9 U. S. C. §1, §2, and the court is required to order arbitration when "satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue. . . ." 9 U. S. C. §4.

Beyond peradventure the contract evidences a transaction involving interstate commerce. It provides, among other things, that for a period of six years New Jersey-based appellee would serve in an advisory and consultative capacity to Maryland-based appellant and would forthwith

turn over to appellant two lists of appellee's paint customers, which lists included some 175 establishments located in several states, which were active customers of appellee purchasing paint from appellee for resale. Among the matters concerning which appellee was to consult and advise appellant were, in appellant's words, "the manufacturing operations [and] sales and servicing of the customers accounts," and the agreement, according to appellant,

> ". . . contemplated and intended an orderly transfer of the assets of the defendant to the plaintiff, and further contemplated and intended that the defendant would consult, advise, assist and help the plaintiff so as to insure a smooth transition of manufacturing operations to Maryland from New Jersey, together with the sales and servicing of customer accounts and the retention of the said customers."

[fol. 60] Appellant's complaint below, seeking rescission of the contract, is based upon allegations that appellee fraudulently induced appellant to enter into this contract knowing that appellee was insolvent and could not satisfactorily perform the contractual commitments.

It is appellant's claim that allegations of "fraud in the inducement" contained in a complaint seeking contract rescission halts arbitration until the validity has been determined of the contract of which the arbitration clause is a part because a rescission action seeks to nullify the existence of that contract. In this circuit, ever since the leading case of *Robert Lawrence Company* v. *Devonshire Fabrics, Inc.*, 271 F. 2d 402 (2 Cir. 1959), *cert. granted*, 362 U. S. 909 (1960), *dismissed pursuant to Rule 60*, 364 U. S. 801 (1960) we have held that an arbitration agreement is separable from the contract within which it is contained. As it is separable, we have held that when there is no allegation of fraud in the inducement to enter into the agreement to arbitrate any controversies or claims arising out of, or re-

lating to, the agreement of which the arbitration agreement is a part, and which agreement is allegedly entered into by fraudulent inducement, the resolution of whether there was in fact fraud in the inducement is properly the province of the arbitrators and not of the court. *Robert Lawrence Company* v. *Devonshire Fabrics, Inc., supra* at 410; *El Hoss Engineer. & Transport Co.* v. *American Ind. Oil Co.*, 289 F. 2d 346, 349 (2 Cir. 1961); *Petition of Kinoshita & Co.*, 287 F. 2d 951 (2 Cir. 1961); *Amicizia Societa Navegazione* v. *Chilean Nitrate & Iodine Sales Corp.*, 274 F. 2d 805 (2 Cir.), *cert. denied*, 363 U. S. 843 (1960).

Here the arbitration provision incorporates the standard clause recommended by the American Arbitration Association, is broad and comprehensive, and, under the law of [fol. 61] this circuit, would most assuredly cover a dispute over fraudulent inducement. See *Petition of Kinoshita & Co., supra.*

Appellant would distinguish *Robert Lawrence* v. *Devonshire* on the ground that there the party seeking the stay of arbitration had sued for damages for a contract breach while here appellant seeks a rescission. We recognize the distinction, but point out that, though the recovery sought in the two cases may differ, the ground upon which each recovery is sought is that of the alleged fraudulent inducement, an issue we hold is one for the arbitrators to resolve. See also *Fabrex Corp.* v. *Winard Sales Co.*, Sup. Ct. New York County, 200 N. Y. S. 2d 278 (1960).

Appellant also maintains that, inasmuch as appellee served a notice to arbitrate pursuant to a provision of New York law prior to appellant's institution of suit in a federal court, appellee's federal court motion to compel arbitration filed in the federal court appellant chose, does not cause federal law to govern as to whether the issue of alleged fraud in the inducement should be adjudicated in court or resolved by arbitrators, but that New York law should control.

There is no merit in this contention. We quote *Robert Lawrence Co.* v. *Devonshire Fabrics, Inc., supra* at 409, and

". . . hold that the Arbitration Act in making agreements to arbitrate 'valid, irrevocable, and enforceable' created national substantive law clearly constitutional under the maritime and commerce powers of the Congress and that the rights thus created are to be adjudicated by the federal courts whenever such courts have subject matter jurisdiction, *including diversity cases,* just as the federal courts adjudicate controversies af- [fol. 62] fecting other substantive rights when subject matter jurisdiction over the litigation exists. We hold that the body of law thus created is substantive not procedural in character and that it encompasses questions of interpretation and construction as well as questions of validity, revocability and enforceability of arbitration agreements affecting interstate commerce or maritime affairs, since these two types of legal questions are inextricably intertwined." (Emphasis supplied.)

*El Hoss Engineer. & Transport Co.* v. *American Ind. Oil Co., supra; Petition of Kinoshita & Co., supra; Metro Industrial Painting Corp.* v. *Terminal Const. Co.,* 287 F. 2d 382 (2 Cir. 1961) at 384-385, and see separate concurring opinion of Judge Lumbard at 385 ff.; *Amicizia Societa Navegazione* v. *Chilean Nitrate & Iodine Sales Corp., supra.*

Appellee has moved for a grant to it of double costs, damages, counsel fees and expense reimbursement, all pursuant to 28 U. S. C. §1912, citing *Chatham Shipping Co.* v. *Fertex S.S. Corp.,* 352 F. 2d 291, 294-95 (2 Cir. 1965), and *A/S Krediit Pank* v. *Chase Manhattan Bank,* 303 F. 2d 648 (2 Cir. 1962). Appellee's motion is not wholly ill-founded, but we believe it better to deny it, for arbitration should now proceed promptly.

Appeal dismissed.

[fol. 63] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 64]

SUPREME COURT OF THE UNITED STATES

No. 343—October Term, 1966

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PRIMA PAINT CORPORATION, Petitioner,

v.

FLOOD & CONKLIN MFG. CO.

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ORDER ALLOWING CERTIORARI—October 17, 1966

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.